Supreme Court, U.S.
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No. 04-406

In The Supreme Court of the United States

JOYCE A. GILCHRIST,

Petitioner,

v.

BOARD OF REVIEW OF THE OKLAHOMA EMPLOYMENT SECURITY COMMISSION, THE OKLAHOMA SECURITY COMMISSION, AND THE CITY OF OKLAHOMA CITY,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

BRIEF FOR THE RESPONDENT OKLAHOMA EMPLOYMENT SECURITY COMMISSION

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QUESTION PRESENTED

Whether it is a violation of Gilchrist's First Amendment rights for the state of Oklahoma to deny her claim for unemployment benefits after she was discharged for misconduct connected to her work, including knowingly giving false and/or misleading testimony as an expert witness for the prosecution in criminal trials?

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OPINION BELOW

The opinion of the Supreme Court of Oklahoma, (Pet. App. 1-19), is published at 94 P.3d 72, 2004 OK 47.

JURISDICTION

The judgment of the Supreme Court of Oklahoma was entered on June 15, 2004. The Petition for a Writ of Certiorari was filed on September 13, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

STATEMENT

Gilchrist was employed by the City of Oklahoma City as a forensic chemist supervisor from May 1980 to September 25, 2001. An investigation into Gilchrist's conduct, including her testimony in criminal prosecutions, was initiated by Oklahoma City police department officials upon receipt of Judge Thompson's opinion in *Mitchell v. Ward*, 150 F.Supp. 2d 1194 (W.D. Okla. 1999). Therein, Judge Thompson determined that Gilchrist's testimony about DNA evidence had been, "without question untrue," and "terribly misleading, if not false," *Id.* at 1226, 1229. Following an exhaustive, fourteen day investigation into allegations against Gilchrist of giving false and/or misleading testimony, laboratory mismanagement, flawed casework analysis and violating a court order, Gilchrist was terminated.

Gilchrist subsequently filed a claim for unemployment benefits with the Oklahoma Employment Security Commission. ("Commission"). The Commission, in a Determination

mailed October 15, 2001, found that Gilchrist was discharged from her employment for mishandling evidence, giving misleading testimony in court and failing to follow established policies and procedures. Further, it was noted in the Determination that "her actions caused innocent citizens unjust punishment." Gilchrist's claim for unemployment benefits was denied on the grounds of willful and/or intentional misconduct connected with the work, pursuant to 40 O.S. §2-406.

Gilchrist filed an appeal of the Commission's Determination to the Appeal Tribunal. In its Order of Decision, mailed February 5, 2002, the Appeal Tribunal affirmed the Commission's Determination denying Gilchrist's claim for unemployment benefits.

Gilchrist appealed the Order of Decision to the Board of Review. In an Opinion issued April 26, 2002, the Board of Review affirmed the denial of unemployment benefits.

Gilchrist appealed the Opinion to the District Court of Oklahoma County. In a Journal Entry of Judgment issued November 1, 2002, the District Court affirmed the Opinion of the Board of Review, again denying benefits. Gilchrist appealed the Journal Entry of Judgment to the Oklahoma Supreme Court on November 13, 2002. On June 15, 2004, the Oklahoma Supreme Court issued an opinion affirming the judgment of the District Court of Oklahoma County. It is from this decision that the instant appeal arises.

REASONS FOR DENYING THE WRIT

Gilchrist has shown no compelling reason for this Court to grant her Petition for Writ of Certiorari. In this

Court and below, Gilchrist has attempted to transform the actual question at issue into one of constitutional concern. As the Oklahoma Supreme Court correctly held, however, no constitutional issue is implicated in this case. The sole issue of whether Gilchrist's conduct on the job amounted to "misconduct" sufficient to warrant a denial of her unemployment benefits claim raises no concerns justifying review by this Court.

Gilchrist urges that denial of her claim for unemployment benefits violated her First Amendment rights, because she was fired, in part, for testifying as an expert witness on behalf of the state. However, her testimony has been judicially determined to be false and/or misleading in more than one instance. Gilchrist is asking this Honorable Court to extend First Amendment protection to her false and/or misleading testimony, presented on behalf of the prosecution in criminal trials.

I. THE OKLAHOMA SUPREME COURT'S DECISION DENYING GILCHRIST'S CLAIM FOR UNEMPLOYMENT BENEFITS WAS APPROPRIATE AND DOES NOT WARRANT REVIEW BY THIS COURT.

Gilchrist was denied unemployment benefits throughout the three-stage administrative process and again at the district court level. The basis for the denial was that since Gilchrist was terminated for misconduct connected to the work, she was not entitled to collect unemployment benefits pursuant to 40 O.S. §2-406. This statute states, in pertinent part, that, "An individual shall be disqualified for benefits if he has been discharged for misconduct connected with his last work, if so found by the Commission."

Misconduct was defined by the Oklahoma Supreme Court in *Vester v. Board of Review of the Oklahoma Employment Security Commission*, 1985 OK 21, ¶ 15, 697 P.2d 533, 537 (Okla. 1985), *citing Boynton Cab Company v. Neubeck*, 237 Wis. 249, 296 N.W. 636, 640 (1941) as follows:

> [c]onduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute.

The Oklahoma Supreme Court held that Gilchrist's conduct in *Mitchell* of knowingly giving false and misleading testimony in a criminal case, constituted misconduct sufficient to support the denial of unemployment benefits. The Court stated:

> Nothing could be more fundamental than the obligation of a forensic chemist employed by a police department to give testimony that is both honest and fair. . . . Clearly, Gilchrist did not satisfy that standard when she testified in Mitchell that the DNA evidence was 'inconclusive,' despite

> having been told by the FBI chemist that the DNA was not Mitchell's.

(Pet. App. 6).

Additional evidence of misconduct was found by the Oklahoma Supreme Court in the opinion of the Court of Criminal Appeals of Oklahoma in *McCarty v. State*, 1988 OK CR 271, 765 P.2d 1215, (Okla. Crim. App. 1988). In McCarty's murder trial, Gilchrist testified that forensic techniques were not advanced enough to allow positive identification of an individual through blood typing, secretor status or hair analysis. The Court of Criminal Appeals held:

> We find it inconceivable why Ms. Gilchrist would give such an improper opinion, which she admitted she was not qualified to give.

Id. at 271, ¶ 6, 765 P.2d at 1218.

Further, the court stated:

> Whether or not Ms. Gilchrist's opinion constituted an improper personal expression of the appellant's guilt, her opinion that appellant was in fact present when violence was done to the victim was an improper expert opinion, because it was beyond the present state of the art of forensic science, and certainly beyond Gilchrist's personal knowledge, as testified to by both Ms. Gilchrist and Mr. Wilson.

McCarty, 1988 OK CR at 271, ¶ 8, 765 P.2d at 1218, 1219.

Upon a review of the evidence before it, the Oklahoma Supreme Court properly concluded that Gilchrist was terminated for misconduct, and that consequently, she did

not qualify for unemployment benefits under Oklahoma law.

II. THE FIRST AMENDMENT IS NOT IMPLICATED IN THE CASE AT BAR AS GILCHRIST'S FALSE AND MISLEADING TESTIMONY IN CRIMINAL TRIALS IS NOT PROTECTED BY THE FIRST AMENDMENT; THEREFORE, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Although it was judicially determined to be false and/or misleading, Gilchrist urges that her testimony in *Mitchell* and *McCarty* is constitutionally protected speech. In a revealing and conspicuous omission, even Gilchrist seems to acknowledge that her testimony was false and/or misleading; because she fails to assert that her testimony was truthful. In fact, she advances the argument that:

> "Even if expert witness testimony is knowingly false, it enjoys immunity from the denial of state public benefits, similar to the immunity enjoyed when applied to public officials as applied in *Briscoe*, 460 U.S. at 330-331."

(Pet. at 17).

Gilchrist repeatedly cites *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731 (1968), in support of her assertion that the government may not deny a benefit to a person on a basis that infringes his constitutionally protected interest in freedom of speech. In *Pickering*, this Court stated,

> In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his

> right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.

Id. at 574, 88 S. Ct. at 1738.

The flaw in the application by Gilchrist of *Pickering* to her facts is that her testimony was judicially determined to be false and/or misleading. In footnote 6 of the *Pickering* opinion, the Court noted that:

> Because we conclude that the appellant's statements were not knowingly or recklessly false, we have no occasion to pass upon the additional question whether a statement that was knowingly or recklessly false would, if it were neither shown nor could reasonably be presumed to have had any harmful effects, still be protected by the First Amendment.

In essence, Gilchrist is asking this honorable Court to consider whether testimony in a criminal trial, that was knowingly and recklessly false and that was shown to have such harmful effects as to shock the conscience, is protected by the First Amendment. The above referenced language in *Pickering* seems to suggest that this is not a question this Court would consider.

Also repeatedly cited by Gilchrist in her petition is *Worrell v. Henry*, 219 F.3d 1197 (10th Cir. 2000). Gilchrist quotes the following statements from *Worrell* in her brief:

> In order to encourage truthful and uninhibited testimony, the law has long afforded certain protections to witnesses. . . . In the last few decades, federal courts have afforded additional protection to witnesses who are employed by the government, concluding that truthful testimony

> is protected by the First Amendment and that a government employee may not be fired or subjected to other adverse action as a result of such testimony.

Worrell at 1204-1205.

Decisions such as *Worrell* do not support Gilchrist's position. Rather, they support this Respondent's argument that Gilchrist's First Amendment rights were not violated. Again, these cases apply to ***truthful testimony.*** Any adverse action taken by the government against Gilchrist, including the denial of her unemployment benefits, resulted from her misconduct, including ***knowingly giving false and/or misleading testimony.***

Justice Opala, in his concurring opinion to that of the Oklahoma Supreme Court, correctly determined that the denial of Gilchrist's claim for unemployment benefits did not violate the First Amendment's Free Speech Clause. He noted that:

> No constitutional barrier, federal or state, has been identified to prohibit the use of judicial analyses of a public employee's expert testimony as proof of unacceptable job performance. . . . No one would dare deny that the government has a compelling interest in maintaining acceptable job performance standards for its personnel.

(Pet. App. 13.)

Gilchrist was terminated, in part, based upon a published opinion by United States District Judge Ralph Thompson in a habeas corpus proceeding, *Mitchell v. Ward*, 150 F. Supp. 2d 1194 (W.D. Okla. 1999). Gilchrist had testified for the prosecution in a rape and murder trial

held in the District Court of Oklahoma County. In connection with the habeas corpus proceeding, an evidentiary hearing was held. Gilchrist had testified at the criminal trial that the FBI's DNA analysis was "inconclusive" regarding whether any DNA sample may have matched Mitchell. However, the FBI chemist testified at the habeas corpus hearing that his report reflected that Mitchell's DNA was not found in the FBI testing. Gilchrist admitted at the habeas corpus hearing that the DNA evidence did, in fact, exclude Mitchell.

Judge Thompson concluded that Gilchrist's trial testimony concerning the inconclusiveness of the DNA evidence was untrue. On appeal from Judge Thompson's ruling in the habeas corpus matter, the United States Court of Appeals for the 10th Circuit stated:

> Ms. Gilchrist thus provided the jury with evidence implicating Mr. Mitchell in the sexual assault of the victim which she knew was rendered false and misleading by evidence withheld from the defense.

Mitchell v. Gibson, 262 F.3d 1036, 1064 (10th Cir. 2001).

Upon receipt of Judge Thompson's opinion in *Mitchell v. Ward*, 150 F. Supp. 2d 1194 (W.D. Okla. 1999), an intensive investigation of Gilchrist's conduct was initiated. Eventually, she was fired, not only for offering false and/or misleading testimony, but also for violating city personnel policies and police department rules, policies and procedures. For example, the Court of Criminal Appeals found that she violated a court order in a criminal matter. In *Pierce v. State*, 786 P.2d 1255, 1261, (Okla.Crim.App. 1990), the Court stated,

> We find that Gilchrist absolutely violated the terms of a Court Order. Instead of following either the letter of the Order or taking steps to have the Order changed or clarified by the court, she took it upon herself to determine the portions of the Order with which she wished to comply. This was not her decision to make. She was under a direct order from the court to provide *all* of the physical evidence to SERI. The failure to abide by a valid order by a trial court will generally have serious consequences and will always be considered error.

Gilchrist was terminated for a variety of reasons, including knowingly giving false and/or misleading testimony in criminal trials. This behavior amounted to misconduct sufficient to warrant a denial of her claim for unemployment benefits under Oklahoma law. The argument that her First Amendment rights were violated when her unemployment benefits were denied because she offered false and/or misleading testimony in criminal trials is without merit.

CONCLUSION

For the foregoing reasons, Respondent, the Oklahoma Employment Security Commission, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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